84-116

No.

In the Supreme Court of the United States

October Term, 1984

JOHN L. VAKAS, M.D.,
Petitioner,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER, M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT, JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HERMAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O., JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D., DON L. McKELVEY, D.C., GORDON E. MAXWELL, M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO, M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER, D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D., RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX A. WRIGHT, D.C., THE STATE OF KANSAS, and THE KANSAS STATE BOARD OF HEALING ARTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. When the members of a state board of healing arts, purporting to act in a quasi-judicial capacity, attempt to extort a release of their personal liability for federal civil rights claims from a physician, are board members entitled to immunity from damages under 42 U.S.C. § 1983?

2. When a state agency has deprived a citizen of rights guaranteed by the fourteenth amendment and no statutory remedy against that entity for the deprivation exists, may a damage remedy be implied directly from the state-directed terms of the fourteenth amendment?

3. When actions of a state are challenged as violative of clear standards of due process of law and no state law question exists, may a federal court abstain from decision in favor of a court of the defendant state?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, John L. Vakas, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 24, 1984.

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1. William C. Swisher, M.D., Frederick J. Good, D.C., Betty Jo McNett, Joan Marshall, D.C., Julia Barbee, D.O., Herman H. Jones, Jr., M.D., F. Lee Doctor, D.O., Jerry L. Jumper, D.O., James A. McClure, M.D., Don L. McKelvey, D.C., Gordon E. Maxwell, M.D., Harold L. Sauder, D.P.M., James D. Bruno, M.D., Richard J. Cummings, M.D., F. J. Farmer, D.O., Helen Gilles, M.D., Dan A. Kelly, M.D., Richard A. Uhlig, D.O., James R. Croy, D.C., Rex A. Wright, D.C., individually and as members of the respondent Board, The State Of Kansas, and The Kansas State Board Of Healing Arts.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 728 F.2d 1293, appears in the appendix hereto. No written opinion was rendered by the District Court for the District of Kansas. A final state-court review of administrative proceedings appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 23, 1984, affirming the District Court's order of dismissal of August 27, 1982. The Court of Appeals denied a timely petition for rehearing on April 16, 1984, and this petition for certiorari was filed within ninety days of the subsequent judgment entered on the rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment XIV:

No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

Jurisdiction of the district court was invoked under the fourteenth amendment and 42 U.S.C. § 1983, and under 28 U.S.C. §§ 1331 and 1343. Petitioner sought damages in the United States District Court for the District of Kansas for respondents' use of state law to compel him to relinquish rights and claims against respondents, thus depriving him of his right to petition the courts for a redress of grievances. Petitioner alleged that:

1. In the board's proceeding against him, the respondent intentionally violated basic tenets of due process of law.

2. Individual respondents threatened to institute further proceedings against him after admitting that the state board had no interest in doing so, merely to coerce petitioner into abandoning his federal civil rights suit.

3. The renewed proceedings against petitioner, instituted solely to extort a release of federal civil rights claims, were unfair and rendered a nullity by the intentional wrongdoing of individual respondents.

See Complaint (app., p. A11). The federal district court dismissed petitioner's complaint in its entirety; the Tenth Circuit affirmed the dismissal. The Petitioner now seeks relief in damages for the respondents' attempts to forestall his constitutional claims against them. The facts leading up to this petition follow.

Petitioner John L. Vakas is a physician practicing in Coffeyville, Kansas. Respondents are members of the Kansas State Board of Healing Arts, the Board itself, and the state. At the conclusion of a hearing on June 20, 1980, a panel of the Board found that petitioner had been negligent in prescription practices. At the panel's recom-

mendation, the Board ordered that Dr. Vakas surrender his privilege to dispense controlled substances for one year; if Dr. Vakas were not to surrender this privilege, the Board would revoke his license to practice medicine. Dr. Vakas appealed to the state district court, which vacated the Board's order of revocation.

In vacating the Board's order, the state district court found numerous violations of petitioner's constitutional rights in the Board's actions, including denial of a full and fair hearing, refusal to allow petitioner to present witnesses in his own behalf, refusal to allow closing argument, failure to state charges with reasonable definiteness, refusal to allow a continuance for just cause, and refusal to allow petitioner to contest findings of the Board's hearing panel before the Board's final decision. *Kansas State Board of Healing Arts v. Vakas,* No. 80-C-233 (Montgomery County 1981) (app., p. A20). The district court remanded to the Board for further proceedings consistent with its findings.

The Board accepted the district court's decision as a final adjudication, and, in its Journal Entry, stated that it did not desire to instigate further administrative proceedings against Dr. Vakas. *See Journal Entry,* paragraph (3) (app., p. A22). The Board, however, conditioned its decision not to instigate further proceedings against petitioner by requiring him to waive "all issues existing between the parties [as] being hereby satisfactorily resolved." *Id.* at paragraph (4). When petitioner resisted signing such a release of all claims, the Board threatened to initiate new proceedings against petitioner to coerce him into abandoning his civil remedies against the board. When petitioner did not agree to the release of claims, new proceedings against petitioner were commenced on June 18, 1982. In early 1983, charges against petitioner

were dismissed by a stipulation that was not to effect petitioner's civil rights case; this agreement was violated, as respondents raised the new stipulation before the Tenth Circuit. The stipulation was entered into after petitioner commenced his action in the United States District Court for the District of Kansas on July 16, 1982, seeking redress for the uncontested violations of his right to due process before the state licensing board and the attempted extortion of a release of his civil rights claims against the respondents.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE IMMUNITY OF MEMBERS OF A STATE ADMINISTRATIVE BOARD UNDER 42 U.S.C. § 1983.

The court below held that the extortion of a release of claims, by and for the benefit of individual members of a state agency who had violated petitioner's rights to due process of law, was quasi-judicial conduct. The Tenth Circuit then found that the individual respondents were entitled to complete immunity from damages under 42 U.S.C. § 1983. In so holding, the court below wholly misapplied decisions of this Court, and acted in clear conflict with decisions of other Courts of Appeals. Its holding is, in reality, a finding that members of quasi-judicial entities are free to extort releases from liability for their federal civil rights violations with impunity.

The holding below immunizes conduct that is plainly unconstitutional. It is axiomatic that an individual state

officer cannot use the power of his office to extort releases and forestall aggrieved plaintiffs' civil rights actions. "What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case." *MacDonald v. Musick,* 425 F.2d 373, 375 (9th Cir.) *cert. denied,* 400 U.S. 852 (1970). Such releases are "void as against public policy" and "basically odious." *Boyd v. Adams,* 513 F.2d 83, 88 (7th Cir. 1975). The individual respondents' actions impinge on petitioner's first amendment right of access to the courts, which must be "freely exercisable without hindrance or fear of retaliation." *Milhouse v. Carlson,* 652 F.2d 371, 374 (3d Cir. 1981); *see also Sanders v. St. Louis County,* 724 F.2d 665, 666 (8th Cir. 1983). That right of access must be a paramount interest:

> The contract for release, if viewed in this light, becomes a trade-off of a public interest for a private interest . . . if the officers' conduct was tortious, the public has no interest in denying their victims redress. If, on the other hand, the officers acted legally, they are afforded the full protection of the law and need not resort to the release for vindication.

Gray v. City of Galesburg, 71 Mich.App. 161, 247 N.W.2d 338, 340 (1976). The decision below allows an administrative agency to unilaterally foreclose access to courts for redress of grievances, even though this Court has unambiguously condemned state actions that impede court access. *See, e.g., Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"). In holding such conduct to be immune from

damage liability, the Tenth Circuit disregarded long-standing mandates of this Court and created an aberration from other circuits' opinions.

In failing to apply the correct test of immunity, the Tenth Circuit ignored the clear dictates of this Court. The Tenth Circuit mistakenly relied on *Stump v. Sparkman,* 435 U.S. 349 (1978), to erroneously determine that the individual Board members were acting in a quasi-judicial capacity. *Opinion below* (app., p. A7). The Court ignored, however, clear guidance from this Court on classification of immunities for members of a board such as respondents. Under *Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719 (1980), a court must match the appropriate grant of immunity to the function under which the board operates at the time of the act. *Id.* at 734-36. The immunity established in *Sparkman* is available only to acts of a judicial character. In acting in an enforcement capacity, however, these individual respondents were entitled to only a qualified immunity. *Butz v. Economou,* 438 U.S. 478, 506 (1978); *United States v. Lee,* 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity"). The qualified immunity is lost when the official acts in an enforcement capacity to deprive one of a clearly established right of constitutional dimensions of which the official had reason to know. *Scheuer v. Rhodes,* 416 U.S. 232, 247-48 (1974), *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982). This test deters unconstitutional conduct such as that practiced by the individual respondents; failure to apply the *Scheuer* standard worked an impermissible injustice against petitioner.

Completely absent from the decision below is any application of the appropriate test, which is applied in

all other circuits.[2] Every circuit except the Tenth applies the good-faith test in situations similar to that before this Court, in recognition that its objective standard implies a presumptive knowledge of, and respect for, "basic, unquestioned constitutional rights." *Wood v. Strickland,* 420 U.S. 308, 322 (1975). Accordingly, the Third Circuit recently found absolute immunity inappropriate to "an attorney general engaged in a quasi-judicial function." *Forsyth v. Kleindienst,* 729 F.2d 267, 272 (3d Cir. 1984). Qualified immunity was also denied; the Court of Appeals affirmed the district court's findings that the defendant did not meet the two-part test of (1) having reasonably believed his actions were not against the law without reason to know they were unlawful and (2) not having taken the action with the intention of depriving plaintiff of a federal right. *Forsyth v. Kleindienst,* 551 F. Supp. 1247, 1259 (E.D. Pa. 1983).[3] The dismissal of Dr. Vakas' claims on the basis of immunity represents a departure from the accepted view in each other circuit, and creates

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2. *See, e.g., Burns v. Sullivan,* 619 F.2d 99, 108 (1st Cir. 1980) (applying qualified, good-faith test to city councilor); *Green v. Maraio,* 722 F.2d 1013 (2d Cir. 1983) (applying test to court reporter); *Forsyth v. Kleindienst,* 729 F.2d 267, 272 (3d Cir. 1984); *Bever v. Gilbertson,* 724 F.2d 1083 (4th Cir. 1984) (approving test for State Department of Highways officials); *Williams v. Treen,* 671 F.2d 892, 896 (5th Cir. 1982) (applying test to state prison officials); *Bier v. Fleming,* 717 F.2d 308 (6th Cir. 1983) (applying test to State Racing Commissioner); *Crowder v. Lash,* 687 F.2d 996, 1006-07 (7th Cir. 1982) (applying the test to state prison officials); *Green v. White,* 693 F.2d 45, 47-48 (8th Cir. 1982) (applying test to State Training Center for Men); *Anderson v. Boyd,* 714 F.2d 906, 908-09 (9th Cir. 1983) (applying test to state parole board members); *Williams v. Bennett,* 689 F.2d 1370, 1385 (11th Cir. 1982) (applying test to state board-of-corrections members).

3. The *Forsyth* court found its holding to be appropriate to the quasi-judicial nature of the defendant's acts: "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Forsyth,* 551 F. Supp. at 1253, *quoting Harlow,* 457 U.S. at 814.

a conflict of both decision and principle that should be corrected.

This conclusion is made imperative by an application of either test of immunity to the facts of this case. Under the accepted standard of qualified immunity, the actions of the individual respondents are entitled to no immunity whatsoever. The threat to institute further proceedings in order to extort a release of civil rights claims could only be motivated by a purely personal attempt at self-protection. Acts performed to further a private purpose cannot be the basis of an immunity. *Beard v. Udall,* 648 F.2d 1264, 1271 (9th Cir. 1981), *Brooks v. Fitch,* 534 F. Supp. 129 (D.N.J. 1981). Indeed, this exercise of state-supported power for the personal benefit of individual respondents takes the action of respondents outside of even the immunity applied by the court below—a purely personal action is, by its nature, one in "clear absence of all jurisdiction." *Stump v. Sparkman,* 435 U.S. 349, 357 (1978). The use of state power and process by individual board members for a wholly illegitimate purpose unauthorized by any act of the State of Kansas cannot be the basis for an immunity.[4] Further, "it certainly violates the fourteenth amendment" to force a citizen to subject his liberty and property to the judgment of a body composed of members with "a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio,* 273

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4. Even the most cursory examination of the Board's statutory grant of authority repudiates any assertion that the individual respondents' conduct was within their jurisdiction. *See Kan. Stat. Ann.* §§ 65-2801-90 (1980 and Supp. 1984). It is beyond the pale of jurisprudential experience to even suggest that individual board members may protect their personal exposure to liability by using the power of their office to extort a release of federal civil-rights claims from a licensee whose livelihood is under their control.

U.S. 510, 523 (1927). The intentional misconduct of the individual respondents, entitled to be taken as true on a motion to dismiss petitioner's complaint,[5] *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), does not deserve the protection of any common-law grant of immunity. *See Tower v. Glover*, 52 U.S.L.W. 4866 (June 25, 1984) (intentional misconduct not immune).[6] The individual respondents' intentional misconduct in extorting a release of claims and concurrently acting as a state-empowered body to protect the pecuniary interest respondents had in obtaining such a release is entitled to no immunity whatsoever.

The conflict engendered by the Tenth Circuit's misapplication of the decisions of this Court justifies the grant of certiorari to review the judgment below.

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5. As a practical matter, any decision with respect to the immunity of the individual state officials is premature where a factual record has not been developed by the trial court.

> A plea of official immunity cannot be sustained until a court has knowledge of the exact nature of the defendants' actions and the precise scope of their official duties. The court can then address the legal question of whether the government's interest in the forthright performance of these duties requires that the officials be held immune from any liability based on their actions.
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> * * *
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> Since we do not have an adequate record to decide the immunity question this aspect of the suit must wait resolution by the district court after hearing.

Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969). The trial court here failed to develop a record upon which any decision concerning immunity could be based.

6. A vague and unsupportable policy of protecting state licensing officers from personal liability cannot be the basis of an immunity:

> We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound social policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions, and if so, what remedial action is appropriate.

Tower v. Glover, 52 U.S.L.W. 4866, 4868 (June 25, 1984).

II. THE DECISION BELOW FAILED TO RESOLVE THE SIGNIFICANT AND OFTEN-ENCOUNTERED ISSUE OF DIRECT IMPLICATION OF A FOURTEENTH AMENDMENT REMEDY FOR VIOLATIONS OF CIVIL RIGHTS BY A STATE ENTITY IN ACCORDANCE WITH PRINCIPLES ELUCIDATED BY THIS COURT.

The holding of the Tenth Circuit perpetuates the paradoxical result of a "state" being insulated from suit under the fourteenth amendment, even though the terms of that amendment "are directed to the states . . . they have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken." *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880). A fundamental tenet of American constitutional law holds that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). For citizens whose rights have been deprived by a state agency,[7] however, no remedy exists under the decision below.[8]

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7. The state is not considered a person for purposes of 42 U.S.C. § 1983. *Hutto v. Finney*, 437 U.S. 678 (1978).

8. This interpretation of the fourteenth amendment twists its meaning to a polar opposite of its intended place in constitutional adjudication. Under the unassailable logic of one of the signers of both the constitution and the Declaration of Independence, the state should be responsible for the consequences of its improper acts:

> The perverted use of genus and species in logic, and of impressions and ideas in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by states and sovereigns, in politics and jurisprudence; in the politics and jurisprudence even of those, who wished and meant to be free. . . . Upon general principles of right shall the [state] when summoned to answer the fair demands of a creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring, I am a sovereign state? Surely not.

Chisholm v. Georgia, 2 Dall. 419, 454, 456 (1793) (Wilson, J.).

Several circuits allow direct remedies; several do not. The continuing confusion among the circuits and the great importance of the question to constitutional jurisprudence and the citizenry of this nation provide compelling justification for this Court to finally resolve the question of whether a direct right of action exists under the fourteenth amendment. The importance of the issue was recognized by this Court, but reserved for future decision, in *Mount Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 278 (1977) ("it is an extremely important question and one which should not be decided on this record").[9] The record in the case now before the Court is, in contrast, a compelling one for a dispositive determination of whether a direct cause of action exists under the fourteenth amendment.

Determination of this issue is imperative in view of the dispositions of the case below, and in view of the contrary decisions across the circuits.[10] The Tenth Circuit was not only in conflict with several circuits; its decision conflicted in principle with clear guidelines from this Court. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971), provided

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9. A direct remedy for damages under the fourteenth amendment need not be fashioned from whole cloth; this Court has allowed a direct remedy for equitable relief under the fourteenth amendment. *See Brown v. Board of Educ.*, 347 U.S. 483 (1954). By any measure of sovereign inviolability, the compulsion of a mandatory injunction is surely a deeper inroad upon the state than exposure to a mere claim for monetary relief.

10. The division of the circuits is geometrical in its divisiveness. The First, Second, Sixth, Seventh and Eighth Circuits have held that a cause of action exists directly under the fourteenth amendment for a claim against a state agency. *See Citadel Corp. v. Puerto Rican Highway Authority,* 695 F.2d 31 (1st Cir. 1983); *Ellis v. Blum,* 643 F.2d 68 (2d Cir. 1981); *Hays v. Jefferson County,* 668 F.2d 869 (6th Cir. 1982); *Winterland Concessions Co. v. Trela,* ..... F.2d ..... (7th Cir. May 17, 1984);

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guidelines for direct implication of constitutional remedies; these principles were further developed in *Davis v. Passman,* 442 U.S. 228 (1979), *Carlson v. Green,* 446 U.S. 14 (1980), *Chappel v. Wallace,* 103 S.Ct. 2362 (1983) and *Bush v. Lucas,* 103 S.Ct. 2404 (1983). The tests developed over this line of cases were ignored by the court below, which held that this Court "strictly limited" the availability of a private right of action. The court below, however, did not apply the appropriate tests to the case. *Opinion below* (app., p. A6).

Had it followed the criteria established by this Court, the court below would have been compelled to find that this case is a proper one for a direct remedy under the fourteenth amendment. This Court has held that the first issue to be addressed is whether the wrong is one for which there is no remedy. *Bivens,* 403 U.S. at 626. Because a state agency may not be sued under 42 U.S.C. § 1983, no remedy exists for Dr. Vakas. Further, it cannot be said that Congress has intended that state law provide the "equally effective" remedy for the redress of violations of federally guaranteed civil rights, *cf. Bivens,* 403 U.S. at 626, as such a remedy would depend upon the vagaries of various state constitutions and the efficacies of various state forums. The second issue to be addressed is consideration of any possible factors "counseling hesitation."

Footnote continued—

Guy v. Swift and Co., 612 F.2d 383 (8th Cir. 1980). The Third, Fourth, Fifth, Ninth and Eleventh, however, have refused to allow such a remedy. *See Black v. Bayer,* 672 F.2d 309 (3d Cir. 1982); *Faust v. South Carolina Highway Dep't,* 721 F.2d 934 (4th Cir. 1983); *Hearth, Inc. v. Department of Pub. Welfare,* 617 F.2d 381 (5th Cir. 1980); *Molina v. Richardson,* 578 F.2d 846 (9th Cir. 1978); *Williams v. Bennett,* 689 F.2d 1370 (11th Cir. 1982). With the addition of the Tenth Circuit, the scale tips against citizens aggrieved by state agency action. It is apparent that a plaintiff with a due-process claim against a state agency has more need for a Ouija board than for a set of Federal Reporters.

Id. at 626. In the case before this Court, all factors counsel swift correction rather than hesitation. It is recognized that section five of the fourteenth amendment does not imply a positive bar by its dormancy. *Adekalu v. City of New York,* 431 F. Supp. 812 (S.D.N.Y. 1977). Further, sound public policy requires that losses from constitutional wrongs at the hands of public officials be allocated among inevitable costs of government borne by all taxpayers, rather than requiring that the entirety of such losses rest on the shoulders of the innocent victim of such action. *See Owen v. City of Independence,* 445 U.S. 622 (1980). Imposition of damage liability for acts of extortion such as that suffered by petitioner would inhibit only misconduct by officials.

As both tests are met by petitioner, it is clear that this case is of the type that this Court has reaffirmed its power to correct:

> This jurisdictional grant (28 U.S.C. § 1331) provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, *Bell v. Hood,* 327 U.S. 678, 684 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights.

Bush, 103 S.Ct. at 2409. Rather than allow petitioner to bear his injury without a remedy,[11] this Court should

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11. Damage from the respondents' act of extortion is clearly actionable under the fourteenth amendment and *Carey v. Piphus* 435 U.S. 247, 262 (1978); the due-process clause guarantees the "feeling of just treatment" by the government. *Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

When a remedy is implied directly under the terms of the fourteenth amendment, the eleventh amendment is no bar to

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review the opinion below to correct the Tenth Circuit's error. The enormous circuit confusion on this significant and often-confronted issue provides full justification for this Court's review of the decision below.

III. IN AFFIRMING ABSTENTION, THE COURT BELOW ACTED IN CONFLICT WITH DECISIONS OF THIS COURT AND INCORRECTLY DECIDED THE UNSETTLED QUESTION OF ABSTENTION IN CIVIL RIGHTS CASES.

The court below dodged the full weight of the immunity issue by affirming abstention in favor of a state determination of respondents' jurisdiction:

> The issue of defining the constitutional limits of the jurisdiction of the Kansas Board of Healing Arts is initially a matter for the State's determination. The

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Footnote continued—

recovery of damages. The fourteenth amendment is recognized as "a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The ratification of the fourteenth amendment (1868) after the eleventh amendment (1798) could not be a clearer manifestation of Kansas' intent to surrender eleventh-amendment immunity for actions brought directly under the fourteenth amendment. "Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Ex parte Virginia*, 100 U.S. 339, 346 (1880). The state should be liable for its civil-rights transgressions: "I hold that this duty of protection, if it rests anywhere, rests on the state, and that if there is to be any liability visited upon anybody for failure to perform that duty, such liability should be brought home to the state." *Cong. Globe*, 42d Cong., 1st Sess. 791 (1871) (remarks of Representative Willard). The question is clearly an open one. *Edelman v. Jordan*, 415 U.S. 651, 694 n.2 (1974) (Marshall, J., dissenting). If § 5 legislation should limit immunity, *Fitzpatrick*, 427 U.S. at 456, certainly the substantive provision on which that enforcement power is based may provide a concurrent limitation on the eleventh amendment. *See Jagnandan v. Giles*, 538 F.2d 1166, 1188 (5th Cir. 1976) (Goldberg, J., concurring).

> principles of comity and federalism dictate that federal courts abstain from premature entry into state judicial construction of administrative disciplinary procedures (app., pp. A7-8).

This holding ignores the proper purposes of abstention, and incorrectly resolves the difficult and unsettled question of forfeiting federal factfinding in civil rights cases in which the state is a defendant.

The court below erroneously relied on *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), to determine that it should not interfere in ongoing state administrative procedures by ascertaining the constitutional limits of the respondents' authority. The court below did not, however, recognize that *Middlesex* could not conceivably apply to petitioner's damage action, which was not a part of any ongoing state administrative procedure; indeed, a damage action such as that brought by petitioner is conspicuously absent from the jurisdictional authority of the Board. *See Kan. Stat. Ann.* §§ 65-2801-90 (1980 & Supp. 1984). These sections have clearly defined the jurisdictional limits of the Board's authority. *See also Kansas State Board of Healing Arts v. Acker*, 228 Kan. 145, 149-52, 612 P.2d 610, 617 (1980). In no circumstance is the behavior of respondents in extorting a release included within the statutory grant of jurisdiction of the Board; nor is an action for damages a part of the administrative review procedure. The action for damages contained in petitioner's complaint cannot be part of any "ongoing" administrative procedure; *Middlesex* is, on its face, inapplicable.[12]

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12. In fact, the "pending" nature of the administrative procedure required by *Middlesex* was emphasized by Justices White and Brennan in dissenting from the denial of certiorari

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Equally inapplicable are all other branches of the abstention doctrine. Because the state has determined the limits of respondents' jurisdiction, the constitutionality of the exercise of that jurisdiction cannot turn on a construction of state law. *Cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention proper only when a state construction of an unclear question of state law could avoid constitutional adjudication); *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25 (1959) (abstention proper only when state law is in a confused condition).[13] If there is no unclear underlying issue of state law, there can be no abstention. *McNeese v. Board of Educ.*, 373 U.S. 668, 671-73 (1963); *Lindsey v. Normet*, 405 U.S. 56, 62 n.5 (1972). Abstention can never be ordered merely to force vindication of a federal claim in state court, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971);

Footnote continued—

in *Etlin v. Robb*, 458 U.S. 1112, 1114 (1982). Further, each circuit to consider application of *Middlesex* abstention has emphasized that the administrative procedure must be "ongoing" or "pending." *See, e.g., Piper v. Supreme Court of New Hampshire*, 723 F.2d 110, 120 (1st Cir. 1983); *Coruzzi v. State of New Jersey*, 705 F.2d 688, 690 (3d Cir. 1983); *KVUE, Inc. v. Austin Broadcasting Corp.*, 709 F.2d 922, 928 n.15 (5th Cir. 1983); *Ada-Cascade Watch Co., Inc. v. Cascade Resource Recovery*, 720 F.2d 897, 902 (6th Cir. 1984); *Ciotti v. County of Cook*, 712 F.2d 312, 313 (7th Cir. 1983); *Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir. 1983); *Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 701 (D.C. Cir. 1984). Only the Tenth Circuit has held otherwise. The bare fact that a state is a party to a proceeding is not sufficient to make abstention appropriate. *Moore v. Sims*, 442 U.S. 415, 423 n.8 (1979). In holding that it was, the court below conflicted with other circuits, as well as with the controlling decisions of this Court.

13. Neither is this a case in which statutory appeal from an agency determination is an integral part of a regulatory scheme. *Cf. Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Burford v. Sun Oil*, 319 U.S. 315 (1943). The limited power of a state district court in reviewing the board's actions does not include any action for damages. *See Kan. Stat. Ann.* § 65-2848.

to do so "would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce and protect every right granted or secured by the Constitution of the United States.'" *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973), *quoting Robb v. Connolly*, 111 U.S. 624, 637 (1884).

This principle applies with even greater force in actions under 42 U.S.C. § 1983, which was meant to impose the federal courts between the state and its citizens as a guardian of federally secured rights. *Mitchum v. Foster*, 407 U.S. 225 (1972). The Civil Rights Act mandates federal factfinding; when facts are in dispute, a federal court must not abstain. *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir., 1973) *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981). A preference for federal factfinding over state factfinding is a recurring theme in the legislative history of § 1983;[14] hence, there is unequivocally no requirement that a litigant exhaust state remedies before filing in fed-

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14. "The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts." *Cong. Globe*, 42d Cong., 1st Sess. 653 (1871) (remarks of Senator Osborne). The reason behind this reliance is clear:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage. . . . We believe that we can trust our United States courts, and we propose to do so.

Cong. Globe, 42d Cong., 1st Sess. 460 (1871) (remarks of Rep. Coburn). Section 1983, in fact, was enacted to provide just such a federal forum. "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts. . . ." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). "Assessing the state of affairs as a whole, Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights." *Allen v. McCurry*, 449 U.S. 90, 109-10 (1980) (Blackmun, J., dissenting) (federal courts are "primary and final arbiters of constitutional rights"). *See also McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Zwickler v. Koota*, 389 U.S. 241 (1967).

eral court. *Patsy v. Board of Regents,* 457 U.S. 496 (1982). Requiring a civil rights plaintiff, such as Dr. Vakas, to litigate a federal constitutional claim solely in state court imposes just such an impermissible requirement, and cannot be countenanced in any system of civil rights jurisprudence.

The Tenth Circuit's departure from accepted views of other Circuits and rejection of clear mandates from this Court, as well as the recurrent importance of the issue of abstention in civil rights cases, justifies the grant of certiorari to review the judgment below.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX ITEM #1

(Filed March 7, 1984)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-2195
82-2476

JOHN L. VAKAS, M.D.,
Plaintiff/Appellant; Plaintiff/Cross-Appellee,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER, M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT, JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HERMAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O., JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D., DON L. McKELVEY, D.C., GORDON E. MAXWELL, M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO, M.D., RICHARD J. CUMMINGS, M.D., F.J. FARMER, D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D., RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX A. WRIGHT, D.C., THE STATE OF KANSAS, and THE KANSAS STATE BOARD OF HEALING ARTS,
Defendants/Appellees; Defendants/Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. CIVIL ACTION No. 82-1589)

Larry W. Wall (Gerrit H. Wormhoudt with him on the brief), Fleeson, Gooing, Coulson & Kitch, Wichita, Kansas, for John L. Vakas, M.D.

Leslie A. Kulick, Assistant Attorney General (Robert T. Stephan, Attorney General, Bruce E. Miller, Deputy Attorney General, Topeka, Kansas, for The State of Kansas, and Wallace M. Buck, Jr., Topeka, Kansas, for Kansas State Board of Healing Arts and Individual Members of Kansas State Board of Healing Arts, with her on the brief).

Before BARRETT and LOGAN, Circuit Judges, and BOHANON, Senior District Judge*

BOHANON, District Judge

Responding to a letter of complaint from six Coffeyville, Kansas, pharmacists, the Kansas Board of Healing Arts conducted a hearing on February 23, 1980, into certain prescription practices of Dr. John L. Vakas. At the conclusion of the hearing, a stipulation was offered to Dr. Vakas in which he would relinquish his Drug Enforcement Administration (D.E.A.) registration for one year. Dr. Vakas chose not to sign the stipulation.

The Kansas Board of Healing Arts then convened a disciplinary panel of six members which conducted a disciplinary hearing on June 20 and 21, 1981. The disciplinary panel found that Dr. Vakas used poor judgment in the over-prescribing of controlled substances. As a corrective measure the panel recommended that Dr. Vakas' license to practice medicine be revoked but that the revocation be stayed should he relinquish his D.E.A. registration for a period of one year.

Dr. Vakas appealed this decision of the Board of Healing Arts to the District Court of Montgomery County,

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*Honorable Luther Bohanon, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

Kansas. The state court ordered a new hearing to be conducted based upon a findings of procedural due process violations.

Shortly after the state court determination, the Kansas Board of Healing Arts offered to settle and dismiss the remanded action and submitted the following language in a proposed journal entry.

> "That the parties hereto mutually agree that any and all differences having existed between the parties are now resolved to the satisfaction of both parties. Any and all issues existing between the parties be hereby satisfactorily resolved."

The proposed journal entry sparked numerous exchanges of letters between the legal counsel for the parties. In sum, the plaintiff rejected the proposed settlement as an attempt by the Kansas Board of Healing Arts to escape liability for unspecified civil causes of action. This conclusion was formed by Dr. Vakas despite repeated assurances by the Board that all that was intended was a resolution of the proceedings before the Board of Healing Arts.

Due to the failure to amicably resolve the parties' differences, the Board scheduled a disciplinary proceedings rehearing date of August 21, 1982.

To prevent the scheduled rehearing, Dr. Vakas instituted this federal action seeking an injunction of the proceedings. He additionally sought damages for alleged constitutional breaches by the Board and its individual members. In response to the federal action the Board voluntarily stayed the scheduled disciplinary rehearing and filed a motion to dismiss.

On August 27, 1982, the United States District Court conducted a hearing on the Board's motion. After oral

argument the court granted the motion to dismiss in its entirety. The court foundationed its decision on the legal principles of abstentionism and immunity. Relying heavily on *Middlesex County Ethics Committee v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), the court recognized the general reluctance of the federal courts to intervene in state disciplinary proceedings under the guise of constitutional review.

Dr. Vakas now appeals the district court's dismissal and alleges as a matter of law that the trial court erroneously resolved two legal issues. He alleges that there exists a private cause of action arising directly under the auspices of the Fourteenth Amendment separate from formal congressional action. Secondly, he alleges that the Board and its members acted beyond the scope of their authority in violating his constitutional rights by committing procedural errors in his original disciplinary hearing and hence cannot claim immunity.

Appellant Vakas also attempts to raise the issue of improper action on the part of the Board and its members in their offer to settle the dispute through the language of the proposed journal entry. However, this issue is not properly raised in a federal proceeding. As the trial court correctly recognized, this issue is but an attempt to seek federal intervention in the state disciplinary process. *See Middlesex County Ethics Committee v. Garden State Bar Assoc., supra.* There is simply no justification for this court to intervene in this manner. This is especially true upon review of the history of this litigation. It is apparent from the actions of the Kansas District Court that the safeguards of the United States Constitution were meticulously afforded Dr. Vakas in his earlier appeal of the Board's disciplinary hearing.

Additional issues that the appellant attempts to raise on appeal deal with the denial of injunctive relief. While these issues are also likely foreclosed by the *Middlesex* abstentionism doctrine, they need not be considered by this court. In early 1983 the parties entered into a stipulation and dismissal of the pending disciplinary action. The stipulation was substantially identical to the earlier offer of settlement by the Board. By virtue of this settlement and dismissal no case or controversy now exists on which to base legal objections to the trial court's refusal to enjoin future disciplinary action. These issues are mooted by the agreed stipulation and dismissal, and appellate review is unwarranted. *See Hall v. Beals,* 396 U.S. 45 (1969).

An additional issue now on appeal is raised through a cross-appeal by the State of Kansas, the Board of Healing Arts, and the Board members in their individual capacities. The cross-appellants claim that the trial court abused its discretion in denying them attorney fees after a favorable resolution of their motion to dismiss.

I. Private Right of Action

Appellant concedes that his claim pursuant to 42 U.S.C. §1983 against the State of Kansas is barred by the Eleventh Amendment to the United States Constitution. *See Alabama v. Pugh,* 438 U.S. 781 (1978); *Hutto v. Finney,* 437 U.S. 678 (1978); *Mt. Healthy City School Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977). However, appellant seeks to have the court fashion a remedy solely from the guarantees of the Fourteenth Amendment. He cites the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) as providing the guidance for the fashioning of such a remedy.

The concept of a private right of action has been strictly limited by the United States Supreme Court in the cases of *Bush v. Lucas,* ..... U.S. ....., 103 S.Ct. 2404 (1983); and *Chappell v. Wallace,* ..... U.S. ....., 103 S.Ct. 2362 (1983). In both *Bush* and *Chappell* the Court refused to form a private right of action for federal employees and cautioned against judicial action in expanding available remedies absent congressional mandate.

An additional compelling justification for court refusal to fashion a private remedy under the Fourteenth Amendment in cases against states and their agencies are the provisions of the Eleventh Amendment. Express waiver of the Eleventh Amendment by congressional action is required under the enforcement mechanism of the Fourteenth Amendment. *Quern v. Jordan,* 440 U.S. 332 (1979); *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). Where, as here, the Congress has chosen not to enact an enforcement scheme *directly* addressing the appellant's situation, the state retains its sovereign immunity.

This appeal is similar to that contained in *Paul v. Davis,* 424 U.S. 693 (1976). As in *Paul,* Dr. Vakas "apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be [allegedly] characterized as a tortfeasor." 424 U.S. at 701. As the Supreme Court explained in *Paul,* there is simply no legal basis to support such an all pervasive view of the Fourteenth Amendment.

II. Immunity of the Board

In addition to a private cause of action against the State of Kansas, appellant seeks to maintain an action against the Board and its individual members for alleged breaches of his constitutional rights. The gravamen of

this complaint is the state district court's finding of procedural due process violations during the original disciplinary hearing. However, it is well established that members of administrative boards who perform judicial functions are immune from damages in a 42 U.S.C. §1983 action when acting in their judicial capacities. *Butz v. Economou,* 438 U.S. 478 (1978). Here, the Board of Healing Arts is specifically delegated such a quasi-judicial role by statute. K.S.A. 65-2801, et seq. Therefore, the issue before the trial court and on appeal is whether, as a matter of law, the Board was acting in their quasi-judicial capacity.

A facial review of the applicable statutes indicates that investigations and decisions whether to commence disciplinary proceedings are within the quasi-judicial jurisdiction of the Board. Therefore, at least facially, the Board's actions comport with their jurisdictional authority.

The standard to apply in determining whether error committed by quasi-judicial officers in the course of their duties is immune from civil action is found in *Stump v. Sparkman,* 435 U.S. 349 (1978). The general standard is strict and holds that immunity is absolute unless there is a "clear absence of all jurisdiction." 435 U.S. at 357. There is no evidence that the hearings conducted by the Board were beyond their jurisdiction. The trial court properly applied the legal doctrine of immunity in this situation.

As stated before, the appellant's allegations of actions allegedly undertaken by the Board outside their role as quasi-judicial officers are not matters properly before this court. The issue of defining the constitutional limits of the jurisdiction of the Kansas Board of Healing Arts is initially a matter for the State's determination. The

principles of comity and federalism dictate that federal courts abstain from premature entry into state judicial construction of administrative disciplinary procedures. *Middlesex, supra.*

III. Attorney Fees

In their cross-appeal, the State defendants contend the district court erred in refusing to award attorney fees pursuant to 42 U.S.C. §1988. They recognize that as a prevailing defendant they may be awarded attorney fees only if appellant's underlying claim was "frivolous, unreasonable, or groundless." *Roadway Express Inc. v. Piper,* 447 U.S. 752 (1980); *Prochaska v. Marcoux,* 632 F.2d 848 (10th Cir. 1980). However, they contend such a finding was made by the court by implication. Although the trial court never made the explicit finding that the plaintiff's action was frivolous, the court made the following comment during the hearing on the motion to dismiss:

> "I can only say that when I came out on the bench, certainly without any preconceived thoughts as to what I would do, but because I thought I understood the state of the law at that time, I did remind the plaintiff that I had read *Middlesex.* I would say to you . . . that as of that point in time I'm not so sure the plaintiffs have read *Middlesex* as it relates to what I then said. But *Middlesex* simply says that the policies underlying *Younger v. Harris* are such that I should abstain."

Citing this statement by the court and recognizing the duty of a plaintiff to make a reasonable investigation of the *legal* basis of an action in order to prevent the filing of frivolous claims, *see Nelson v. Miller,* 227 Kan. 271, 607 P.2d 438 (1980), the cross-appellants argue that any find-

ing other than that the plaintiff's case was "frivolous, unreasonable, or groundless" is error.

However, upon a full review of the record in this action, this court cannot make the observation that the plaintiff's case was *necessarily* frivolous or unfounded. Although the plaintiff was confronted with substantial opposing authority, the areas of constitutional law which he sought to explore were not without some slight legal support. While this court might personally make a different finding given the history of the case, we cannot conclude that the trial court abused its discretion.

Accordingly, the trial court's findings were proper in every respect and they are hereby

AFFIRMED.

(Filed April 24, 1984)

MARCH TERM - April 16, 1984

Before Honorable James E. Barrett, Honorable James K. Logan, Circuit Judges, and Honorable Luther Bohanon, District Judge*.

Nos. 82-2195
82-2476

JOHN L. VAKAS, M.D.,
Plaintiff-Appellant,
Cross-Appellee,

vs.

PAUL RODRIQUEZ, M.D., et al.,
Defendants-Appellees,
Cross-Appellants.

This matter comes on for consideration of the petition for rehearing filed by plaintiff-appellant, cross-appellee, John L. Vakas, M.D.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

APPENDIX ITEM #2

(Filed July 16, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. .....

JOHN L. VAKAS, M.D.
Plaintiff,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER, M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT, JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HERMAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O., JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D., DON L. McKELVEY, D.C., GORDON E. MAXWELL, M.D., HAROLD J. SAUDER, D.P.M., JAMES D. BRUNO, M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER, D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D., RICHARD A. UHLIG, D.O., AMES R. CROY, D.C., REX A. WRIGHT, D.C., THE STATE OF KANSAS, and THE KANSAS STATE BOARD OF HEALING ARTS,
Defendants.

COMPLAINT

COMES NOW John L. Vakas, M.D., plaintiff, and alleges as follows:

1. Plaintiff is an individual licensed to practice medicine in the State of Kansas.

2. At all times pertinent to the facts and events hereinafter alleged, the individual defendants were members of the defendant Kansas State Board of Healing Arts.

3. At all times pertinent to the facts and events hereinafter alleged, the defendant Kansas State Board of Healing Arts was an agency and instrumentality of the defendant State of Kansas.

4. At all times pertinent to the facts and events hereinafter alleged, the defendants were acting under color of K.S.A. 65-2801, *et seq.*, and other laws, customs and usages of the State of Kansas, to deprive plaintiff of the rights, privileges and immunities secured to him by the Constitution and Laws of the United States, all as more particularly stated herein.

5. This action arises under 42 USCS 1983 and the Fourteenth Amendment to the Constitution of the United States, and this Court has jurisdiction of the action under 28 USCS §1331, and 1343.

FIRST CLAIM FOR RELIEF

6. On or about May 5, 1980, the defendant Kansas State Board of Healing Arts filed a Petition for Revocation Suspension, or Limitation of License against plaintiff.

7. Beginning shortly after May 5, 1980, and continuing until the present, the defendants continuously and repeatedly took actions which deprived plaintiff of his right not to be deprived of property without due process of law, and his right to equal protection of law, including his right to a full and fair hearing as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

8. In particular, defendants violated the rights of plaintiff by failing to state the charges against him with reasonable definiteness, by refusing to make even a good faith attempt to cooperate with plaintiff's attempts to ascertain the factual basis for the charges against him, by refusing plaintiff a full opportunity to present arguments, by refusing to grant plaintiff adequate time to prepare a defense to the charges, by refusing to permit plaintiff to cross-examine certain witnesses and explore matters bearing directly upon the issues of the proceedings, and by refusing plaintiff's request for specific findings of fact.

9. In performing the acts described above, the defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive plaintiff of rights guaranteed to him under the Constitution and laws of the United States and particularly those hereinabove enumerated.

10. The above-described acts of defendants were outrageous, arbitrary, capricious, abusive, oppressive, unreasonable, and intentional.

11. As a direct consequence and result of the above-described conduct of defendants, plaintiff has suffered and continues to suffer serious and debilitating anxiety and emotional distress, and has suffered damages in an amount in excess of $10,000.00.

12. Defendants, by virtue of their repeated, continuous and reckless disregard of plaintiff's rights, have demonstrated a malicious desire and intentions to injure plaintiff, and on account of such malicious behavior, plaintiff is entitled to punitive damages in an amount in excess of $10,000.00.

WHEREFORE, plaintiff prays for judgment against the defendants, jointly and severally in an amount in excess

of Ten Thousand Dollars ($10,000.00); for punitive damages in an amount in excess of Ten Thousand Dollars ($10,000.00); and for costs and attorneys' fees herein.

SECOND CLAIM FOR RELIEF

13. On or about August 10, 1980, plaintiff appealed a decision of the Board of Healing Arts revoking his license to practice medicine in the State of Kansas for one year to the Fourteenth Judicial Court, Montgomery County, Kansas.

14. After considering the arguments and briefs of the parties, on October 21, 1981, Judge Floyd V. Palmer vacated the decision of the Board and found that plaintiff's rights had been violated in the following respects:

1. Dr. Vakas was denied a full and fair hearing in accordance with minimal due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and similar provisions of the Constitution of the State of Kansas.

2. The charges were not stated with reasonable definiteness. K.S.A. 65-2841, *Morgan v. United States,* 304 U.S. 1, 82 L.Ed. 1129; *Simmons v. United States,* 348 U.S. 397, 405, 99 L.Ed. 453; *Adams v. Marshall,* 212 Kan. 595; *Rydd v. State Board of Health,* 202 Kan. 721.

3. The denial of Licensee's request for a continuance on and before June 20, 1980 for good cause shown was a prejudicial abuse of discretion contributing to the denial of Licensee's due process rights.

4. The Board further deprived the Licensee of due process of law by denying him the right to produce witnesses in his own behalf and by refusing to allow

his attorney to present closing argument. *Adams v. Marshall,* 212 Kan. 595; *Winkelman v. Allen,* 214 Kan. 22.

5. As brought out in oral argument, the Hearing Panel did not submit a copy of its findings and recommendations to the Licensee prior to the meeting of the Board to reach its decision in reliance thereon and the Licensee was not given the chance to appear before the Board and contest those findings and recommendations prior to the final decision of the Board, all contrary to mandatory procedure and therefore the order cannot stand.

15. The decision of Judge Palmer is now a final and binding judgment which has not been appealed by the defendants.

16. Following the decision of Judge Palmer, the Board informed plaintiff that it wished to have its investigator talk with plaintiff and various pharmacists in the Coffeyville area to determine if plaintiff had been prescribing medication in a manner acceptable to the Board, and further indicated that it would refrain from further proceedings against the plaintiff if Mr. McGuire's investigation was favorable to plaintiff.

17. On or about the 22nd day of March, 1982, Mr. McGuire presented to the Board a report in which he stated that

> After investigation and interview with Dr. Vakas, it would appear that Dr. Vakas's practice of writing scripts has changed since the petition was filed and is not of the type that the Board was concerned about when charges were filed against Dr. Vakas at least it appears as such at the present time.

18. On or about the 28th day of April, 1982, the plaintiff was informed that the Board had concluded that there was no reason to continue the proceedings against plaintiff.

19. On or about April 28, 1982, the Board forwarded to plaintiff a Journal Entry of Judgment which, if executed by plaintiff, would have released defendants from all liability arising from their violation of the rights of plaintiff.

20. When plaintiff refused to execute a Journal Entry containing a release of claims, and requested that a Journal Entry reflecting only the decision of Judge Palmer be entered, the Board informed plaintiff that, notwithstanding its earlier decision that further proceedings against plaintiff were unnecessary, if plaintiff would not execute a Journal Entry containing a release, the Board would retry him on the original charges.

21. Plaintiff refused to execute the Board's Journal Entry and, on or about July 12, 1982, plaintiff was served with a Petition pursuant to which the Board seeks to retry Plaintiff on the original charges.

22. By threatening to institute further proceedings against plaintiff if he did not agree to release defendants from civil liability for their wrongful acts, defendants intentionally, maliciously, arbitrarily, capriciously, and improperly utilized state law and power for illegitimate and wholly personal purposes and in an abusive and coercive manner designed to chill plaintiff's right and privilege to seek the assistance of the courts to redress obvious violations of rights secured to him.

23. On account of the foregoing abuse of state power, plaintiff has suffered severe emotional distress and anxi-

ety, and has been damaged in an amount in excess of $10,000.

24. Throughout the proceedings against plaintiff, and notwithstanding the protests of plaintiff, defendants have demonstrated a continuing pattern of reckless and malicious disregard of the rights of plaintiff, and on account of such behavior plaintiff is entitled to punitive damages in an amount in excess of $10,000.

WHEREFORE, plaintiff prays for judgment against the defendants, jointly, and severally, for damages in an amount in excess of Ten Thousand Dollars ($10,000); for punitive damages in an amount in excess of Ten Thousand Dollars ($10,000); for his costs and attorney's fees herein.

THIRD CLAIM FOR RELIEF

25. The new Petition filed against plaintiff by the Board again fails to state the charges against plaintiff with reasonable definiteness.

26. At least three years have passed since the occurrence of the still unspecified acts giving rise to the charges against plaintiff, and during such period important witnesses have disappeared and memories have deteriorated to the point that plaintiff will be denied the right to a fair hearing.

27. The lengthy and prejudicial period of time that has transpired since the occurrence of the allegedly wrongful acts of plaintiff is a direct result of the wrongful behavior of the defendants.

28. By instituting further proceedings against plaintiff, defendants are intentionally, arbitrarily, capriciously, maliciously, and improperly using state law and power

for illegitimate and wholly personal purposes and in an abusive and coercive manner intentionally designed to chill plaintiff's right and privilege to seek the assistance of the courts to redress obvious violations of rights secured to him.

29. On account of the foregoing, it is and will be impossible for plaintiff to obtain a fair and impartial hearing from defendants, and defendants therefore should be permanently enjoined from retrying plaintiff on the original charges against him.

WHEREFORE, plaintiff prays for judgment temporarily and permanently enjoining defendants from conducting a rehearing of the charges originally filed against him; and for his costs and attorney's fees herein.

FOURTH CLAIM FOR RELIEF

30. On account of wrongful behavior of defendants, the original proceedings before the Board have been rendered a nullity.

31. The new proceedings instituted by the Board to retry plaintiff will necessarily force plaintiff to duplicate the sizeable costs and attorney's fees he incurred in connection with the original proceedings.

32. Such duplication of costs and fees will be a direct result of the wrongful behavior of defendants during the prior hearing.

33. On account of the foregoing, plaintiff should be awarded judgment in an amount in excess of $10,000 for all costs and fees incurred by him in connection with the original proceedings before the Board.

WHEREFORE, plaintiff prays for judgment against defendants, jointly and severally, in an amount in excess

of Ten Thousand Dollars ($10,000), and for his costs and attorney's fees herein.

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APPENDIX ITEM #3

Floyd Van Palmer
Associate District Judge
Fourteenth Judicial District
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October 20, 1981

Mr. Wallace M. Buck, Jr.
Kansas Board of Healing Arts
503 Kansas Ave., Suite 500
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Mr. Larry Wall
Fleeson, Gooing, Coulson & Kitch
P.O. Box 997
Wichita, Kansas 67201

Re: Board of Healing Arts vs John L. Vakas, M.D.
Case No. C-233 I

Gentlemen:

The Court has reached the following decision in the captioned case:

The order of the Board of Healing Arts revoking the license of Dr. John L. Vakas should be and hereby is set aside and vacated. This ruling is made on the following grounds:

1. Dr. Vakas was denied a full and fair hearing in accordance with minimal due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and similar provisions of the Constitution of the State of Kansas.

2. The charges were not stated with reasonable definiteness. KSA 65-2841, *Morgan v. United States,* 304 U.S. 1, 82 L.Ed. 1129; *Simmons v. United States,* 348 U.S. 397, 405, 99 L. Ed. 453; *Adams v. Marshall,* 212 Kan. 595; *Rydd v. State Board of Health,* 202 Kan. 721.

3. The denial of Licensee's request for a continuance on and before June 20, 1980 for good cause shown was a prejudicial abuse of discretion contributing to the denial of Licensee's due process rights.

4. The Board further deprived the Licensee of due process of law by denying him the right to produce witnesses in his own behalf and by refusing to allow his attorney to present closing argument. *Adams v. Marshall,* 212 Kan. 595; *Winkelman v. Allen,* 214 Kan. 22.

5. As brought out in oral argument, the Hearing Panel did not submit a copy of its findings and recommendations to the Licensee prior to the meeting of the Board to reach its decision in reliance thereon and the Licensee was not given the chance to appear before the Board and contest those findings and recommendations prior to the final decision of the Board, all contrary to mandatory procedure and therefore the order cannot stand.

Mr. Wall will prepare findings of fact and conclusions of law consistent with the foregoing and a Journal Entry setting aside the order of the Board entered herein.

Very truly yours,

/s/ Floyd V. Palmer
Floyd V. Palmer
Associate District Judge

FVP:eff

APPENDIX ITEM #4

IN THE DISTRICT COURT OF
MONTGOMERY COUNTY, KANSAS

Case # 80 C 233

KANSAS STATE BOARD OF HEALING ARTS,
Plaintiff/Appellee

vs.

JOHN L. VAKAS, M.D.
Defendant/Appellant.

JOURNAL ENTRY

On this 28th day of April, 1982, the above matter comes on for hearing. Plaintiff/Appellee appears by and through its attorney Wallace M. Buck, Jr., and the Defendant/Appellant appears by and through his attorney, Larry W. Wall, and there are no other appearances.

The Court being advised in premises, finds:

(1) That by memorandum opinion and letter of October 20, 1981, the Honorable Judge Floyd Van Palmer rendered his opinion herein; that a copy of said letter opinion is attached hereto and made a part hereof in its entirety by reference as though fully set out herein;

(2) That said memorandum opinion of Judge Palmer sets out his findings of fact and conclusion of law as found to be applicable in these proceedings;

(3) That the parties are desireous of concluding these proceedings by accepting Judge Palmer's decision

and not requesting that either his decision be appealed or that the matter be remanded for an additional administrative hearing, the parties mutually agreeing that it is in the best interests of both parties, for reasons as they have discussed, to conclude these proceedings in this fashion;

(4) That the parties herein mutually agree that any and all differences having existed between the parties are now resolved to the satisfaction of both parties; any and all issues existing between the parties being hereby satisfactorily resolved;

(5) That Court costs due and owing the Clerk of the Montgomery County District Court in the sum of $16.00 will be borne by Plaintiff/Appellee.

IT IS SO ORDERED.

.....
Judge Floyd Van Palmer

Approved by:

/s/ Wallace M. Buck, Jr.
Wallace M. Buck, Jr.
Attorney for Plaintiff/Appellee

.....
Larry W. Wall
Attorney for Defendant/Appellant